1951

File No. B Legis. Mem. (Removal of disqualification) 51

Legal Department

B BRANCH

Subject:— L. A. Bill No. XXX of 1951.

A Bill to provide for the removal of certain disqualifications for being chosen as and for being a member of the Bombay legislative Assembly and the Bombay legislative Council.

Bombay Act No. XXV of 1951

P.18

File No. B. Legis. Mem. (Removal of Disqualification) 51

Gen. 191 e.

535-B

IMMEDIATE

GOVERNMENT OF INDIA
Ministry of Law

No. F.52/50-C

From

K.V.K.Sundaram Esqr.,I.C.S.,
Secretary to the Government of India.

To

The Chief Secretary to the
Government of Bombay,
Bombay.

New Delhi, dated the 2nd February, 1950.

Sir,

I am directed to invite your attention to article 191(1)(a) of the Constitution which provides that a person shall be disqualified from being chosen as, and for being, a member of a House of the Legislature of a State if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule to the Constitution, other than an office declared by the Legislature of the State ~~xxxx

is possible that they might be proceeding on the view that that law would be sufficient and effective for the purposes of Article 191(1)(a), I am to suggest that it would be safer for them to undertake fresh legislation immediately. If necessary such legislation can be given retrospective effect from the commencement of the x Constitution. This was done in Bombay in a similar situation in 1937 (see section 3 of Bombay Act I of 1937). The point was also considered by the Government of India on a different occasion, and they too were advised that there was no legal objection to enact x retrospective legislation in regard to this matter.

3. If the State Legislature is not in session steps may be taken for the promulgation of an Ordinance on the subject to be followed up in due course by an Act of the State Legislature. If the Legislature is in session it will be necessary to get an Act passed by the Legislature without delay.

Yours faithfully,

(K. V.K.SUNDARAM)
Secretary to the Government of India.

BKS. 4/7/
4c.

No.3557
Legal Department,
Bombay Castle (Bombay No.1), 14th March 1950.

From

J.R. Dhurandhar Esquire,
Additional Secretary to Government of Bombay,
Legal Department.

To

The Secretary to the Government of India,
Ministry of Law,
NEW DELHI.

Subject: Removal of certain disqualifications for being chosen as and for being a member of a State Legislature - Legislation under Article 191(1)(a) in connection with.

Sir,

With reference to your letter No.F-52/50-C, dated the 2nd February 1950, on the subject noted above, I am directed to observe as follows:-

Article 191(1)(a) of the Constitution provides that a person shall be disqualified from being chosen as, and for being, a member of a House of the Legislature of a State if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule to the Constitution, other than an office declared by the Legislature of the State by law not to desqualify its holder. The Legislature of the State means the Legislature as constituted under the Constitution. It is true that the existing Legislatures have been empowered to exercise the powers and perform the duties conferred by the provisions of the Constitution on the Houses of the Legislatures of a State. But such Legislatures are not Legislatures of the States constituted under the constitution but are only Legislatures functioning under article 382. The Constitution, therefore, draws a distinction betweenthe Legislature of a State and that functioning under article 382. The Legislature of a State functioning under article 382 is therefore not the same as the Legislature of the State constituted

under the Constitution. This view is supported by the decision of the Bombay High Court in People's Own Provident and General Insurance Co. V. Guracharya 47. Bom.L.R. 852) in which the High Court has held that the Boards constituted under the BombayAgricultural Debtor's Relief Act, 1939, on which powers of Civil Court were conferred were not Civil Courts.

2. The Legislatures of the States which will be constituted under the Constitution on the basis of adult franchise will be quite distinct in character from the existing Legislatures. The existing Legislatures of this State is the same in composition and character as the Legislature of the Province constituted under the Government of India Act, 1935, and, therefore, any law made for the removal of disqualifications with reference to such Legislature under the Government of India Act, 1935, would continue to operate with suitable adaptation even after the Constitution of India has come into force. No new law for the removal of disqualifications as suggested in your letter is necessary.

3. Moreover, under clause (1) of article 372 of the Constitution of India all the laws in force inthe territory of India immediately before the commencement of the Constitution shall continue in force therein until altered, or repealed, or amended by a competent Legislature or other competent authority. The Bombay Legislature Members (Removal of Disqualifications) Act, 1937, is a law in force immediately before the commencement of the Constitution and, therefore, continues in force. It is true that thearticle says that the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force subject to the provisions of the Constitution; but there is no provision ofthe Constitution under which the Bombay Legislature Members (Removal of Disqualifications) Act, 1937, can be considered to have been repealed

or of no effect. The repeal of the Government of India Act, 1935, by the Constitution of India does not automatically repeal the laws made under the Government of India Act, 1935. On the contrary, they are expressly saved by clause (1) of article 372 and there is nothing to indicate in the Constitution of India that the Bombay Legislature Members (Removal of Disqualifications) Act, 1937, stands repealed on the commencement of the Constitution.

4. In the circumstances, the Bombay Government is of the opinion that the Bombay Legislature Members (Removal of Disqualifications) Act, 1937, would continue in force and it would not be necessary at present to undertake any legislation in this matter.

Yours faithfully,

(J. R. Dhurandhar).
Additional Secretary to Government.

BKS.
4/7/

GOVERNMENT OF INDIA
Ministry of Law

No. F. 52/50-C.

From

B.G.Murdeshwar,
Deputy Secretary to the Government of India.

To

The Additional Secretary to the
Government of Bombay,
Legal Department,
BOMBAY.

New Delhi, dated the 12th April, 1950.

Sir,

I am directed to refer to your letter No.3557, dated the 14th March, 1950, regarding the question of disqualification for membership of a State Legislature arising out of the holding of any office of profit under Government.

2. The Government of India are unable to agree with the view that the Legislature of a State functioning under article 382 is not the Legislature of a State within the meaning of article 191(1)(a). It is clear from article 168(1), as adapted by the Constitution (Removal of Difficultires) Order No.II, read with article 382, that during the transitional period, the Legislature of a State consists of the Governor and the existing House or Houses functioning under article 382. It is recognised by the Constitution elsewhere as the Legislature of the State - a Legislature stricto sensu, and not something else. In article 389, the words "the Legislature of the corresponding State under this Constitution" undeniably include this the provisional legislature as well as the Legislature to be constituted hereafter under Part VI. That article thus furnishes clearest internal evidence that in this respect the provisional legislature stands on the same footing as a legislature constituted under Part VI, and is equally the "legislature of the State" within the meaning of the Constitution. Moreover, the Constitution

(Removal of Difficulties) Order, No. II, makes it clear that subject to the exceptions and modifications specified in Part II of the Schedule thereto, the provisions of Part VI of the Constitution apply in relation to the provisional legislature; and article 191 is left unmodified. It is, therefore, impossible to maintain that that article does not apply in relation to members of a house of a legislature functioning under article 382.

3. The decision of the Bombay High Court in the People's Own Provident and General Insurance Co. V. Guracharya (47. Bom. L.R. 852) does not bear on the question. In that case a board constituted under a Bombay Act for certain purposes, and invested with some of the procedural powers (but not the entire powers and jurisdiction) of a civil court was held not to be a court. The principle of this decision is clearly inapplicable here, since the provisional legislature has all the powers and all the duties and functions of the legislature of the State.

4. As regards paragraph 2 of the letter under reference, the Houses of the provisional legislature although initially constituted under the Government of India Act, 1935, are continued by virtue only of the provisions of the Constitution and are therefore subject to the provisions of the Constitution, inter alia, article 191. Conversely, the Government of India Act, 1935, has been repealed by the Constitution and section 69(1) of that Act which prescribed the qualifications for membership of the old Provincial Legislature is no longer in force. Any Act of the Provincial Legislature made with reference to that section, though continuing in force by virtue of article 372, is obviously ineffective since it cannot apply in relation to the disqualifications prescribed by article 191(1)(a), whereunder the power to remove the disqualification vests only in the Legislature of the State under the Constitution.

BKS. 4/7/

5. The Government of India is of opinion, therefore, that Bombay Act I of 1937 does not protect Parliamentary Secretaries who are continued in office after the 26th January, 1950, against the disqualification arising under article 191(1)(a). If any question be raised on the point it will have to be decided in accordance with the opinion of the Election Commission: see article 192. It is for the Bombay Government to decide whether they should adhere to the view stated in the letter under reference and incur the risk of their Parliamentary Secretaries being unseated if that view be not upheld by the Election Commission, or whether they should enact a law as advised by this Government x so as to preclude or at least minimise that risk.

Yours faithfully,

(B.G.MURDESHWAR)
Deputy Secretary to the Government of India.

BKS. 4/7/ 4c.

Legal Department.

Statement of the case.

Article 191(1)(a) of the Constitution of India provides that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State if he holds any office of profit under the Government of India or the Government of any State specified in the First Schedule, other than an office declared by the Legislature of the State by law not to disqualify its holder. This provision corresponds to section 69(1)(a) of the Government of India Act, 1935. By Bombay Act No. I of 1937 (The Bombay Legislature Members (Removal of Disqualifications) Act, 1937) it was declared that a person shall not be disqualified for being chosen as, or for being a member of the Assembly or Council merely by reason of the fact that he holds any office of Parliamentary Secretary to a Minister of the Government of Bombay and certain other offices.

2. A State Government having raised the question whether a Provincial Act providing for the removal of disqualification under the corresponding section 69(1)(a) of the Government of India Act, 1935, will be available for the purposes of the provision of article 191(1)(a), the Government of India opined that the ± disqualification mentioned in article 191(1)(a) can be removed only by <u>law made by the Legislature of the State</u>, and a law passed by the Legislature of the corresponding Province or Indian State before the 26th January , 1950, even if it is suitably adapted under article 372(2) of the Constitution, cannot be regarded as such a law. The Government of India, therefore, suggested that it would be safer for the State Governments to undertake fresh legislation immediately. If necessary such legislation can be

given retrospective effect from the commencement of the Constitution. This was done in Bombay in a similar situation in 1937 (see section 3 of Bombay Act I of 1937).

3. The Bombay Government, however, did not agree with the view expressed by the Government of India. The Legislature of the State means the Legislature as constituted under the Constitution. It is true that the existing Legislatures have been empowered to exercise the powers and perform the duties conferred by the provisions of the Constitution on the Houses of the Legislatures of a State. But such Legislatures are not Legislatures of the States constituted under the Constitution but are only Legislatures functioning under article 382. The Constitution, therefore, draws a distinction between the Legislature of a State and that functioning under article 382. The Legislature of a State ~~fmm~~ functioning under article 382 is therefore not ~~hm~~ the same as the Legislature of the State constituted under the Constitution. This view is supported by the decision ofthe Bombay High Court in People's Own Provident and General Insurance Co. V Guracharya 47. Bom. L.R. 852) in which the High Court has held that the Boards constituted under the Bombay Agricultural Debtor's Relief Act, 1939, on which powers of Civil Court were conferred were not Civil Courts.

4. The Legislatures of the States which will be constituted under the Constitution on the basis of adult franchise will be quite distinct in character from the existing Legislatures. The existing Legislature of this State is the same in composition and character as the Legislature of the Province constituted under the Government of India Act, 1935, and, therefore, any law

made for the removal of disqualifications with reference to such Legislature under the Government of India Act, 1935, would continue to operate with suitable adaptation even after the Constitution of India has come into force.

5. Moreover, under clause (1) of article 372 of the Constitution of India all the laws in force in the territory of India immediately before the commencement of the Constitution shall continue in force therein until altered, or repealed, or amended by a competent Legislature or other competent authority. The Bombay Legislature Members (Removal of Disqualifications) Act, 1937, is a law in force immediately before the commencement of the Constitution and, therefore, continues in force. It is true that the article says that the law in force in the territory of India immediately before the commencement of the Constitution shall continue in force subject to the provisions of the Constitution; but there is no provision of the Constitution under which the Bombay Legislature Members (Removal of Disqualifications) Act, 1937, can be considered to have been repealed or of no effect. The repeal of the Government of India Act, 1935, by the Constitution of India does not automatically repeal the laws made under the Government of India Act, 1935. On the contrary, they are expressly saved by clause (1) of article 372 and there is nothing to indicate in the Constitution of India that the Bombay Legislature Members (Removal of Disqualifications) Act, 1937, stands repealed on the commencement of the Constitution. In the circumstances, this Government was of opinion that the Bombay Legislature Members (Removal of Disqualifications) Act, 1937, would continue in force and it would not be

necessary to undertake any legislation in the matter.

6. The views expressed in paras 3 to 5 were communicated to the Government of India in reply to their letter referred to above. Now, however, the Government of India have informed this Government that for the reasons stated in their letter dated 12th April 1950 they are unable to agree with the view that the Legislature of a State functioning under article 382 is not the Legislature of a State within the meaning of article 191(1)(a) and that in their opinion Bombay Act I of 1937 does not protect Parliamentary Secretaries who are continued in office after 26th January 1950 against the disqualification arising under article 191(1)(a). A copy of the Government of India's letter of 12-4-50 is sent herewith. It is difficult to accept the view of the Government of India which is far from convincing.

7. In view of the importance of the question, the Advocate General is requested to advice Government whether any fresh legislation is necessary under article 191(1)(a) of the Constitution of India.

Id/-J.R.D. 1/6
Additional Secretary to Government,
Legal Department.

U.R. to Advocate General No.7442 dated 1st June 1950.

BKS. 4/7/

4c.

Slip A

Under Article 372 of the Constitution all existing laws continue to be in force. So also under Article 382, the old Chambers of Legislature continue until the new Houses are duly constituted and are summoned to meet. But a doubt has been raised whether such Acts as Bombay Legislature Members (Removal of Disqualification) Act, 1937

Bill No. XXX of 1951.

Office of the R.L.A.

The Bombay Legislative Members (Revenue Disqualification) Bill.

Article 191 (1)(a) of the Constitution provides that a person shall be disqualified for being chosen as, and for being, a member of the Legislative Assembly or Legislative Council of a State, if he holds any office of profit under Government, other than an office declared by the Legislature of the State by law not to disqualify its holder. The persons mentioned in the Schedule to the Bill are the holders of office of profit under Government, and they would not be entitled to stand for election to the Legislature unless this Legislature declares by law that the holders of the said offices are not disqualified. The Bill is intended to carry out that object. Similar provision was made under the Constitution under the Government of India Act, 1935, by passing the Bombay Legislature Members (Removal of Disqualification) Act, 1937 (See slip A) would be held to be a law made by the Legislature of the State within the meaning of Article 191 of the present Constitution. It is necessary therefore to pass the present law and to give it retrospective effect from 26th January 1950 when the new Constitution came into force. So far as Parliamentary Secretaries are concerned, in England it is provided that they are holders of office of profit under the Crown, but they are not disqualified from being members of the British Parliament (May's Parliamentary Practice

p.202). In British Parliament as many as 92 officers are so exempted. Similar Acts passed by other States are: (1) The U.P.Act II of 1950, (2) West Bengal Act XXXVIII of 1950. The Parliament has also passed a law removing disqualification of the Parliamentary Secretaries. See the Parliament Prevention of Disqualification Act, 1950.

Sd/.- J.R .Dhurandhar.
Remembrancer of Legal Affairs.

H.M. (H.D.)

BKS.

4/7/

No. 172-L
Legal Department,
Council Hall, Poona, 15th September 1951.

From

Shri J.R. Dhurandhar,
Secretary to the Government of Bombay.

To

The Secretary to the Governor of Bombay.

Subject:- The Bombay Legislature Members (Removal of Disqualifications) Bill, 1951.

Sir,

With reference to article 200 of the Constitution of India, I am directed to forward herewith for the assent of His Excellency the Governor the authentic copy of the Bombay Legislature Members (Removal of Disqualifications) Bill, 1951, which was read for the third time and passed at the meetings of the Bombay Legislative Assembly and the Bombay Legislative Council held on the 22nd and the 31st August 1951, respectively

2. The subject-matter of the Bill falls under entry 37 in List II in the Seventh Schedule to the Constitution of India. It is not necessary to reserve the Bill for the consideration of the President with reference to article 31(3) or 254(2) or any other article of the Constitution of India.

3. The date on which His Excellency the Governor's assent is given may kindly be entered in the endorsement.

4. I also forward herewith one copy of each of the items

1. Bill as introduced in the Bombay Legislative Assembly with the Statement of Objects and Reasons.	:	Nos. 1, 2 and 4
2. Bill as read for the third time and passed by the Bombay Legislative Assembly and as introduced in the Bombay Legislative Council.	:	and two copies of
3. Bill as read for the third time and passed by the Bombay Legislative Council.	:	item No.3
4. Extracts from the proceedings of the Bombay Legislative Assembly dated the 22nd August, 1951 and of the Bombay Legislative Council dated the 31st August 1951.	:	of the papers noted in

the margin, The Bill was not referred to a Select Committee.

Yours faithfully,

Id/-J.R.D. 15/9
Secretary to Government.

BKS.
4/7

No. G.S.- 2363

From

THE SECRETARY TO THE GOVERNOR OF BOMBAY

To

The Secretary to Government,

Legal Department.

GOVERNMENT HOUSE.

~~BOMBAY~~ GANESHKHIND September 17, 1951

Poona 7;

Subject: The Bombay Legislature Members (Removal of Disqualifications) Bill, 1951.

Sir,

"With reference to your letter No. 172-L, dated September 15, 1951, I am directed to return herewith the authentic copy of the Bombay Legislature Members (Removal of Disqualifications) Bill, 1951, with His Excellency the Governor's assent signified thereon.

Yours faithfull,

Secretary to the Governor.

BKS.
4/7. 4c.

ACTS.

Publication of the Bombay Legislature Members (Removal of Disqualifications) Act, 1951.

GOVERNMENT OF BOMBAY.
Legal Department,
Resolution No. 192-L
Council Hall, Poona, 19th September 1951.

Letter to the Secretary to the Governor, No.172-L, dated the 15th September 1951.

Letter from the Secretary to the Governor, No,G.S.-2363, dated the 17th September 1951.

"With reference to your letter No.172-L., dated September 15, 1951, I am directed to return herewith the authentic copy of the Bombay Legislature Members (Removal of Disqualifications) Bill, 1951, with His Excellency the Governor's assent signified thereon."

RESOLUTION:- The law should be published as Bombay Act No. XXV of 1951, in the Bombay Government Gazette dated the 20th September 1951.

2. The Act should be translated into Marathi, Gujarati, Kannada and Hindi (in Devnagari script) and the translations should be published in the Bombay Government Gazette.

By order of the Governor of Bombay,

K.J. PATHARE,
Assistant Secretary to Government.

To

The Manager Government Central Press, Bombay (with a copy of the Act and with a request that 50 Gazette copies of the Act may be forwarded to the Legal Department),

*The Oriental Translator to Government,
The Bombay Legislature Department,
The Director of Publicity, Bombay,
The Enquiry Officer for the Secretariat, Bombay.
) with a copy of the Act.

* With five extra copies of the Act.

BKS.
4/7/
4c.

Bombay Act No. XXV of 1951

~~L. A. BILL No. XXX OF 1951.~~

An Act

~~A Bill~~ *to provide for the removal of certain disqualifications for being chosen as, and for being, a member of the Bombay Legislative Assembly and the Bombay Legislative Council.*

(As read for the third time and passed by the Legislative Assembly on the 22nd August 1951.)

(As read for the third time and passed by the Legislative Council on the 31st August 1951.)

WHEREAS by the Constitution of India, provision has been made for declaring by Act of the State Legislature any office of profit under the Government of India or the Government of any State specified in the First Schedule to the said Constitution not to disqualify its holder for being chosen as, and for being, a member of a State Legislature; And whereas it is expedient to make such declaration; It is hereby enacted as follows :—

1. This Act may be called the Bombay Legislature Members (Removal of Disqualifications) Act, 1951. Short title

Removal of certain disqualifications.

2. A person shall not be disqualified for being chosen as, or for being, a member of the Bombay Legislative Assembly or the Bombay Legislative Council merely by reason of the fact that he holds any of the offices specified in the Schedule appended hereto.

Repeal.

3. The Bombay Legislature Members (Removal of Disqualifications) Act, 1937, is hereby repealed.

Act to come into force on 26th January 1950.

4. The provisions of this Act shall be deemed to have come into force on the 26th day of January 1950.

Schedule.

1. The office of the Parliamentary Secretaries to the Ministers of the Government of Bombay.

2. The office of part-time professors or lecturers in a Government college.

3. Any office in the National Cadet Corps or the Territorial Army.

4. The office of the Secretaries of the District Rural Development Boards :

Provided that the holders of such office do not hold any other office of profit under the State Government.

Government of Bombay

LEGAL DEPARTMENT

[L. A. BILL No. XXX OF 1951.]

(As read for the third time and passed by the Legislative Assembly on the 22nd August 1951.)

(As read for the third time and passed by th Legislative Council on the 31st August 1951.)

A Bill to provide for the removal of certain disqualifications for being chosen as, and for being, a member of the Bombay Legislative Assembly and the Bombay Legislative Council.

[Shri DINKARRAO NARBHERAM DESAI, M.L.A.]

MO-v Bk Hb 188—2

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